89-810

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NO.___

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

JOHN DOE, A MINOR, BY AND THROUGH HIS PARENT AND NEXT FRIEND, MARY DOE,

PETITIONER

VS.

SUMNER COUNTY BOARD OF EDUCATION,

RESPONDENT

APPENDIX

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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TENNESSEE STATE DEPARTMENT OF EDUCATION

DUE PROCESS HEARING

APRIL 9, 1987

[JOHN DOE]

Petitioner,

v.

SUMNER COUNTY SCHOOL SYSTEM

Respondent.

ORDER

A hearing was held in the above matter by agreement of the parties on March 4, 1987, (scheduling order attached as Exhibit 1 hereto) and continued by agreement of the parties until March 23, 1987. Mr. Gary Buchanan, Esq. represented the Petitioners. Ms. Kimberly Whaley, Esq. represented the Respondents. At the conclusion of the hearing the date for submission of this order was enlarged by agreement of the parties to April 10, 1987, in order to

allow counsel time to submit briefs.

ISSUES TO BE CONSIDERED

At the hearing the issues were defined as follows:

1. Whether the Respondent should be obligated to pay for the private placement of this child at the Brehm School in Carbondale, Illinois for the 1986-1987 school year.

2. Whether Respondent should be obligated to pay for the continued placement of the child at the Brehm School in the future.

FINDINGS OF FACT

1. The child is a handicapped child as defined by the provisions of 20 U.S.C. Section 1401 and TCA Section 49-10-102.

2. The Respondent is a local education agency as defined by 20 U.S.C. Section 1401 and a school district as defined by TCA Section 49-10-102.

3. The child is eligible for educational and related services pursuant to, 20 U.S.C. 1401 et. seq. and, T.C.A. 49-10-101 et. seq.

4. The child has, in fact, has been receiving such services through most of his school years.

5. On September 3, 1985, a multidisciplinary team meeting was held and an individual educational plan (IEP) was formulated at that time. The child was entering the ninth grade in the Sumner County Public Schools. The mother was a participant in that meeting. At the time the meeting was held there was a difference of opinion between the mother and agents of the Respondent as to the level of services to be provided by the Respondent. The Respondent's agents were of the opinion that a more restrictive, more intensive English resource classroom was the

appropriate placement for a part of the day to deal with the child's significant deficits in reading comprehension. The parents opted for "mainstreaming" the child in a regular reading classroom.

6. In view of these differences of opinion concessions were made on both sides and an agreed upon IEP was implemented on September 3, 1985. This IEP, Exhibit S1 to the transcript, contained short range goals and objectives and a specific plan for implementation and appears to have been completed in substantial compliance with 34 CFR Section 300.346.

7. The parents became dissatisfied with this IEP on or before February 19, 1986. They were particularly dissatisfied with the reading class to which the child had been assigned. The Respondent's agents at that time offered another alternative to this reading class which would have been a

more restrictive special education placement which would have been located in a different school, (Beech School.) This suggestion was rejected by the parents. However, at this time no "M team meeting" was requested.

8. The parents, in part, rejected the Respondents proposals for the more restrictive placements proposed by the school system based upon a fear of stigmatizing the child and damaging his self-esteem. Additionally, it appeared that the child was developing a negative; listless attitude towards school, and the parents felt that the other children in the proposed placement had poor study habits and were a poor influence on the child.

9. As a part of the IEP implemented in September, 1985, the parents were to provide tutoring for the child at their own expense after school and in addition to the

classroom work assigned at school.

10. After the February, 1986, confrontation the differences did not resolve themselves. As a result an "M team" meeting was held on April 25, 1986. At this meeting the parents presented their proposals that the child be placed with the Brehm School in Carbondale, Illinois, and that the placement be paid for by the Respondent. Alternative placements in the Sumner County School System were briefly discussed. The meeting was abruptly terminated by the Petitioners counsel, who attended the meeting with the parents. At that time counsel advised that it was the Petitioners intention to "Test the limits of the law" or words to that effect. At this meeting a proposed IEP from the Brehm School was not available nor had it been drafted and no IEP utilizing services from the Sumner County School was drafted since

the meeting had been terminated.

11. The child subsequently was placed by the parents in the Brehm School for the 1986-87 school year. The expense of that placement is presently being born by the parents.

12. The Brehm school is an appropriate placement for the child and is meeting the child's needs at this time.

13. The Brehm school is a highly restrictive placement servicing only handicapped children, and is at a considerable distance from the child's home.

14. The child is making good progress at the Brehm School in his academics and appears to be happy and comfortable in that program.

FINDINGS OF LAW

In the instant case, as in all such cases in Tennessee, there exists both

federal and state statutes and regulations which control the obligation of a school system to provide education for handicapped and special children. Although the federal and state acts are parallel in many aspects there are differences in some of their provisions. In Tennessee, the state law predates the federal legislation and thus cannot be viewed as merely intended to implement the federal act.

One difference between the state and federal act is the question of the standard as to the level of services which must be provided by a local school system. The state act provides that a school system is required to provide "...special education services sufficient to meet the needs and maximize the capabilities of handicapped children". On the other hand the federal act provides that a "free appropriate education" be provided.

In view of the pronouncements of the United States Supreme Court and the First and Third Circuits, this difference cannot be considered to be insignificant or superficial. The leading Supreme Court case interpreting the Education for all Handicapped Children's Act is Hendrick Hudson Dist. Bd. of Education v. Rowley 458 U.S. 176. (1982). In Rowley the Supreme Court was called upon to decide the meaning of the terms "free appropriate education" which are found at 20 U.S.C. 1404 (18). In wrestling with this problem the court resorted to an extensive study of the legislative history behind the Act stating:

> The Acts evolution and major provisions shed light on the questions of statutory interpretation which is at the heart of this case. Rowley, 458 U.S. at 179.

After a lengthy discussion of the legislative history of the Education for Handicapped Children's Act, the Court drew

a distinction between "maximization" of a handicapped child's potential and the requirement under the Act that a public school system provide a "free appropriate education". The Court recognized that a "maximization" standard is a higher obligation. Rowley 458 U.S. 197 n.21, 200. This distinction is important in that the legislature of the State of Tennessee has undertaken this higher obligation. The state law states in pertinent part:

> 49-10-101. Legislative intent - Application of parts 1 though 6. - (a)(1) It is the policy of this state to provide, and to require school districts to provide, as an integral part of free public education, special education services sufficient to meet the need and maximize the capabilities of handicapped children. [emphasis added]

Thus, the extensive analysis of legislative history in Rowley concerning the meaning of the term "free appropriate education" is inapposite to the standard to

be applied to public education in the State of Tennessee.

In David D. v. Dartsmouth, 775 F.2d 411 (1st Cir. 1985), the court considered the interrelationship between the Education for Handicapped Children Act's requirement that a school system provide a "free appropriate education" and the Massachusetts state law requirement that the public school system "assure the maximum possible development of a child with special needs." The Court found that the United States Congress contemplated that a consistent body of law would be applied throughout all stages of the due process hearing system, "intertwining federal and state standards into one body of law", so as not to leave a case brought under the Act dependent upon whether an appeal is taken to federal or state court. The Court went on to find that where a

state has chosen to provide a law greater benefits to handicapped children than required by the federal Act, the broader state protection is incorporated into the federal Act by the express intent of congress. The state law is not preempted by narrower federal rights. David D., 775 F.2d at 419, 420. Accordingly, the court found that the District Court did not err by applying the maximization standard found in Massachusetts state law.

In Geis v. Board of Education of Parsippany - Troy Hills, 774 F.2d 575(1985) the third Circuit ruled that the New Jersey code provision which required the public school to provide special education programs and related services "according to how the pupil can best achieve success in learning" was a greater standard than the "floor" requirements mandated by the federal Act. Geis, 774F.2d at 583.

The Court in Geis found, as did the First Circuit in David D., that state standards were intended by Congress to be incorporated into the federal Act where the rights provided children are broader than under the federal Act. The court held that such broader protection was not preempted by the federal legislation. Geis, 774 F.2d at 581.

Such greater standard such as exists in Tennessee cannot be said to favor generally a private education over public education. Public schools are generally better funded, and provide higher salaries to attract qualified teachers. Public schools generally have a broader student basis thus allowing for more economical segmentation of the student body and thus economies of scale in providing services. Further both the federal and state Acts express a bias for mainstreaming

exceptional children, that is placing the child in a educational setting with non-handicapped children either in the school that he would attend if he were not handicapped or in a school that is reasonably close to his home. This is referred to as placing the child in the "least restrictive environment". T.C.A. 49-10-103 (2)(c); 34CFR Section 300.550 - Section 300.566.

Although there is little guidance as to what maximization requires it is intuitive that a policy of maximization would require a school system to keep abreast of new educational techniques and implement such techniques; that a school system give careful attention to the needs of individual exceptional children; that the school system be innovative and sensitive to the needs of individual children; and that the individual

handicapped child's program be monitored and adjusted in the event that it is not working for him.

The mechanism for accomplishing this individualization of a handicapped child's education is a "multidisciplinary team" and the product of that team the "individual educational plan (IEP)". It is contemplated by the federal and state laws that this team will be composed of professionals from various disciplines. The parents are to be an integral part of the "M team". However, the parents are only members and are not the final arbitrators as to the contents of the individual educational plan. 34CFR Section 300.226, 300.355; Tennessee State Administrative Regulations, Requirements for School Approval Section 0520-1-3-.09, 5(i). In the event of a perceived need for a change of placement or service, as

occurred in the instant case, an M team meeting must be requested by the party proposing the change. A meeting will then be held and if an impasse is reached at the M team between the parents and the school as to what a proper IEP should contain the parents may request a due process hearing. During the interim, while the disagreement is pending resolution in the due proces proceedings or reviewing court, the child's "present educational placement is to remain in effect". 34 CFR Section 300.513; Tennessee State Administrative Regulations, Requirements for School Approval, Section 0520-1-3.09 5(i). In the instant case, a due process hearing was not requested by the parents until well after the child's placement in the private school. 1/

1/ The hearing now under consideration was the result of that request.

Further, it is not possible to determine whether or not comparable educational opportunities were available in the Sumner County Public Schools since the "M team" meeting of April 25, 1986, was abruptly ended.

Such a comparison must be made and a finding that the school system could not afford such services entered prior to a hearing officer's awarding the cost of such private placement. 34 CFR Section 300.403.

In view of the past willingness of the Respondent school system to discuss educational issues with the parents, to accommodate reasonable request by the parents, and to implement innovative programs, Petitioners' plea that further negotiations with the school system would have proved to be futile has a hollow ring. Further, the restrictiveness of the Brehm placement (i.e. its distance from the home

of the child and being a placement populated exclusively by handicapped children) further milates in favor of this rationale.

Although Rowley is inapposite in regard to the standards to be applied as to the level of educational services that must be offered by a school system, the remaining holdings of that case do apply. The Supreme Court in Rowley emphasized the necessity of compliance with the procedural safe-guards contained in the Act placing these procedural requirements on the same plane as the substantive requirements of that Act. Rowley, 458 U.S. 205,206.

As to the first issue, payment for placement in the Brehm school for the 1986-1987 school year, the parents, bypassed two important procedural safeguards prior to enrolling the child in the Brehm School. The "M team" meeting and the due process

hearing. Accordingly, pursuant to 34 CRF Section 300.403 the placement in Brehm School for 1986-1987 school year is ordered to be a cost to the parents. As to future placement, it is not possible at this juncture to determine whether or not the Sumner County schools are capable of providing an appropriate educational plan in keeping with the standards of this state, since no Individual Educational plan has yet been considered in an "M team" meeting. Such a decision thus is not ripe for decision.

Accordingly, it is ordered that an "M team" meting be held to determine what educational and related services can be provided by the Sumner County Schools in order to maximize the child's potential. If after such an "M team" meting is held and negotiated in good faith a dispute still exists the parents may request a due

process hearing to resolve the dispute. It is clear that the give and take of an "M team" meeting and the preparation of an individual educational plan are at the very heart of the educational guarantees that are an essential element of the administrative procedures provided for by the federal and state acts and such procedures may not be given mere lip service nor bypassed.

IT IS SO ORDERED

ENTERED this 9 day of April, 1987.

James R. Mulroy, II

Administrative Judge

John DOE, a minor, by and through his parent and next friend, Mary Doe

v.

Charles SMITH, Commissioner, Tennessee Department of Education, et. al.

Docket No. 3-86-0467

United States District Court for the Middle District of Tennessee, Nashville, Division

March 11, 1988

NIXON, District Judge

MEMORANDUM

This lawsuit is an appeal pursuant to 20 U.S.C. Sec. 1415 (b)(2) of two administrative hearings held by the state concerning the educational needs of plaintiff John Doe, a handicapped child. The record below was supplemented by additional proof in a hearing held by the Court on September 28, 1987. This Memorandum constitutes the Court's findings of fact and conclusions of law.

I. FINDINGS OF FACT

Plaintiff John Doe, a sixteen year old at the time of the hearing in this mater, suffers from certain language disorders[1] that have made obtaining a normal education difficult. Dr. Judith Kaas, a clinical psychologist who evaluated plaintiff in September of 1984, described plaintiff's difficulties as follows:

> Students with language disorders can encounter difficulty following directions, understanding classroom presentations, comprehending textbook material, and expressing themselves orally and/or in writing. Language therapy should focus on comprehending materials utilized in [plaintiff's] classes and preparing assignments.
>
> [Plaintiff's] academic achievement levels are significantly impaired. He would not be expected to function successfully in a regular program without extensive support. Means of compensating for his learning

[1] Plaintiff has a neurological disorder called agenesis of the corpus callosum, which impairs communication between the two hemispheres of the brain.

> disability are needed. Textbook material may need to be taped and tests given orally. As previously noted, [plaintiff] may need special help in comprehending text materials and classroom presentations.

Kaas also reported the results of the Woodcock-Johnson Test of Achievement that she administered to plaintiff. At the time of the test, plaintiff was at grade level 8.1, yet the test indicated that he was performing at the following grade levels:

Reading	4.5
Mathematics	4.8
Written language	4.8
Knowledge	5.7

Restated, plaintiff was behind at the time of the test in each subject by the following number of years:

Reading	3.6
Mathematics	3.3
Written Language	3.3
Knowledge	2.4

In the one and one-half years prior to Kaas' evaluation, the Sumner County school system gave two group administered achievement tests. Plaintiff's performance on these tests, based on national percentile information included with the test results, was as follows:

<u>March 1983 Test</u>	
Reading	28%
Mathematics	22%
Language	46%
Basic Battery	30%
Science	1%
<u>March 1984 Test</u>	
Reading	18%
Mathematics	20%
Language	16.6%
Basic Battery	14%
Science	14%
Social Studies	20%
Complete Battery	14%

Shortly after Kaas' evaluation was completed, plaintiff's parents met with plaintiff's Multidisciplinary Team [hereinafter referred to as "M-Team"], a group composed of plaintiff's parents and educators familiar with plaintiff's individual handicap and the special education program at plaintiff's school, in order to decide what special education services would be needed by plaintiff for the 1984-85 school year at Hawkins County Junior High School. The M-Team developed an Individualized Education Program [hereinafter referred to as "I.E.P."] that spelled out in writing the plan for plaintiff's education for the upcoming school year. Under the I.E.P., plaintiff was to be placed in regular classes subject to ten specific modifications that were intended to enable plaintiff to do mainstream academic work by compensating

for and accommodating his language disability. Among these modifications were the following:

(1) A week's overview of material was to be provided in advance by teachers.

(2) Textbooks were to be taped.

(3) Study sheets for tests were to be provided by teachers.

(4) Copies of old tests were to be provided by teachers.

During the 1984-85 school year, plaintiff's mother became dissatisfied with the manner in which plaintiff's I.E.P. was being implemented. She contacted Robert Tipps, a State Department of Education employe, on several occasions and requested his help in obtaining the local school officials' cooperation in implementing plaintiff's I.E.P. Tipps went to Sumner county on at least two occasions and met

with plaintiff's mother and, in addition, he made phone calls to local school officials and attended an M-Team meeting. When Tipps determined that plaintiff's mother and the local school officials were not going to be able to resolve their differences, he advised plaintiff's mother that she should request a due process hearing. Plaintiff's mother made such a request in the Spring of 1985.

The State of Department of Education appointed an employee of another county's school system to serve as the hearing officer and to conduct the due process hearing. The state regularly appointed local educational employees to serve as hearing officers in counties outside their employment.[2] The hearing was held on June 18, 1985, at which time plaintiff's mother and the local school officials each presented evidence on the issue of whether

plaintiff had been provided with special education or other education that was insufficient in quantity to satisfy the requirements of the law. At this hearing, plaintiff's mother submitted proof that many of the modifications listed in the I.E.P. had not been complied with. On July 19, 1985, the hearing officer found that plaintiff "ha[d] ben provided with special education which [was] sufficient in quantity to satisfy the requirement of the law."

[2] In response to the Eleventh Circuit's decision in Mayson v. Teague, 749 F.2d 652 [1984-85 EHLR DEC. 556.316] (11th Cir. 1984) (holding that the appointment of local educational employees as hearing officers for due proces hearings violated the Education For All Handicapped Children Act, 20 U.S.C. Sec. 1401, et seq., because such persons were not impartial) the state appointed a hearing officer pool not made up of local educational employees on October 24, 1985, after the 1985 due process hearing was held in the instant case.

In October of 1985, the Sumner County schools again gave a group administered achievement test. Plaintiff's performance on this test, based on national percentile information included with the test results, was as follows:

October 1985 Test	
Reading Comprehension	9%
Reading Vocabulary	20%
Spelling	18%
English	7%
Social Science	15%
Science	17%
Using Information	3%
Total Reading	12%
Total English	9%
Mathematics	8%

The results of this test, in conjunction with the results of the two achievement tests administered in 1983 and 1984, show that plaintiff's academic

performance fell further behind, as compared to his peers, between 1983 and 1985. this decline is evident when plaintiff's percentile scores for each test are averaged:

March 1983 Test - 25.4%

March 1984 Test - 16.57%

October 1985 Test - 11.8%

During the 1985-86 school year, plaintiff again attended Hawkins County Junior High School. On April 25, 1986, plaintiff's M-Team met in order to develop a new I.E.P. for him for the 1986-87 school year. Because plaintiff would be entering the tenth grade and attending high school in Sumner County, the M-Team included the resource teacher from Hendersonville High School. Plaintiff's mother attended the meeting with her lawyer. The resource teacher attempted to explain what programs the high school could offer to assist

plaintiff. Plaintiff's mother, however, prevented the teacher from describing the high school's program, telling the M-Team members that she was not there "to investigate the possibility of high school.... It was [not] appropriate." Instead, she requested that the M-Team develop an I.E.P. placing plaintiff in the Brehm School, which is located in Carbondale, Illinois. The Brehm School is a private residential school for handicapped children that is 210 miles from plaintiff's home in Tennessee. The M-Team refused plaintiff's mother's request and stated that it was not proper to go from an educational program that was almost the least restrictive to one that was the most restrictive. The lawyer accompanying plaintiff's mother then abruptly terminated the meeting stating that they intended to "test the limits of the law."

On May 22, 1986, the instant action was initiated. While the action was pending, plaintiff's parents enrolled him in the Brehm School for the 1986-87 school year. Plaintiff's M-Team never approved this placement. The cost to plaintiff's parents for plaintiff to attend the Brehm School during the 1986-87 school year totaled $18,425.05. The cost for the first semester of the 1987-88 school year totaled $12,803.74.

The high school that plaintiff would have attended in Sumner County, Hendersonville High School, had one resource teacher who taught 25 students in resource classes that had teacher/student ratios of from eight-to-one to twelve-to-one. In addition to the 25 students she worked with in resource classes, she was responsible for 15 additional students on "consultation" and 50 gifted students. She

oversaw and was responsible for approximately 100 I.E.P.s. The Brehm School had an overall teacher/student ratio of three-to-one. Six of the 13 faculty members were learning disabilities specialists and plaintiff's faculty advisor was a speech-language pathologist. While at the Brehm School, plaintiff has had two classes with eight students in them, and the remainder of his classes have had between three and six students in them. In contrast to the educational backsliding that plaintiff experienced while attending school in Sumner County between 1984 and 1986, as evidenced by his achievement test scores during that time, he has performed at grade level while attending the Brehm School.

In the Spring of 1987, while this lawsuit was pending, plaintiff's mother requested a due process hearing to consider

whether Sumner County was obligated to reimburse her for plaintiff's expenses while attending the Brehm School for the 1986-87 school year and in the future. The state appointed a hearing oficer, and plaintiff's mother and the local school officials presented proof in a hearing that took place on March 4 and 24, 1987. The hearing officer issued a decision on April 9, 1987, in which he stated:

> As to the first issue, payment for placement at the Brehm School for the 1986-87 school year, the parents bypassed two important procedural safeguards prior to enrolling the child in the Brehm School. The M-Team meeting and the due proces hearing. Accordingly, pursuant to 34 C.F.R. Sec. 300.403 the school year is ordered to be at cost to the parents. As to future placement, it is not possible at this juncture to determine whether or not the Sumner County schools are capable of providing an appropriate educational plan in keeping with the standards of this state, since no Individualized Educational Program has yet been considered in an M-Team meeting. Such a decision is not ripe for decision.

The hearing officer then ordered that "an M-Team meeting be held to determine what educational and related services can be provided by the Sumner county Schools."

Pursuant to the hearing oficer's order, plaintiff's mother met with the M-Team on May 28, 1987. The other members of the M-Team explained to plaintiff's mother what the high school could offer plaintiff and presented an I.E.P. which proposed that plaintiff be placed at Hendersonville High School for the 19987-88 school year. Plaintiff's mother did not agree with the I.E.P. and refused to sign it. thereafter, she did not request a due process hearing. Instead, on June 12, 1987, plaintiff made a motion in this Court to file a supplemental complaint that stated claims pertaining to events that occurred subsequent to the first due process hearing in June of 1985. Plaintiff requested that the Court find

that plaintiff's appropriate educational placement was at the Brehm School and award him reimbursement for costs incurred as a result of this placement. The Court granted plaintiff's motion to file a supplemental complaint on July 14, 1987.

II. CONCLUSIONS OF LAW

This action was brought pursuant to the Education For All Handicapped Children Act (hereinafter referred to as "EAHCA"), 20 U.S.C. Sec. 1401, et seq. In addressing plaintiff's claims, the Court begins by enunciating the proper standard for reviewing decisions at due process hearings held by the state concerning a handicapped child's educational needs. The Court then considers each of the due process hearings separately. Finally, the Court considers what relief should be accorded to plaintiff's parents.

A. STANDARD OF REVIEW

Title 20 U.S.C. Sec. 1415 (e)(2) of the EAHCA states that a court reviewing an appeal from a due process hearing "shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." In Board of Education v. Rowley, 458 U.S. 176, 206 [1981-82 EHLR DEC.553:656] (1982), the Supreme Court discussed the court's role in reviewing an EAHCA due process decision as follows:

> [T]he provision that a reviewing court base its decision on the "preponderance of the evidence" is by no means an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review. The very importance which congress has attached to compliance with certain procedures in the preparation of an IEP would be

> frustrated if a court were permitted simply to set aside decisions as nought. The fact that Sec. 1415(e) requires that the reviewing court "receive the records of the [state] administrative proceedings" caries with it the implied requirement that due weight shall be given to these proceedings...
>
> Therefore, a court's inquiry in suits brought under Sec. 1415 (e)(2) is twofold. First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedure reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the state has complied with the obligations imposed by Congress and the courts can require no more.

(Footnotes omitted). In Roncker on behalf of Roncker v. Walter, 700 F.2d 1058, 1062 [1982-83 EHLR DEC. 554-381] (6th Cir. 1983), the Sixth Circuit discussed the Rowley decision and added that "the standard of review as set out in Rowley requires a de novo review but...the district court should give due weight to the state administrative decisions in

reaching its decision."

In the instant case, the Court has received the 1985 and 1987 administrative records from plaintiff's two due process hearings and has received additional evidence at the request of all parties to this action. Based on the administrative records and the additional evidence, the Court now must conduct a de novo review, based on the preponderance of the evidence, giving due weight to the expertise of the school authorities and the administrative hearing officers, of the decisions reached in two due process hearings in this case.

B. 1985 DUE PROCESS HEARING

Before considering any matters addressed by the hearing oficer at the 1985 due process hearing, the Court first must consider whether this appeal was initiated within the applicable statute of limitations. The EAHCA contains no

specific statute of limitations. As a result, as the Supreme Court held in Wilson v. Garcia, 471 U.S. 261 (1985), the most appropriate Tennessee statute of limitations must be determined by the Court. The nature of this determination was recently discussed by the Sixth Circuit in Janzen v Knox County Board of Education, 79 F.2d 484, 486 [1985-86 EHLR DEC.557-329] (6th Cir. 1986):

> In Wilson, a 42 U.S.C. Sec. 1983 action, the Supreme Court provided a framework to use when deciding which state statute of limitations should apply to a federal cause of action that has no express limitations period. The Court directed that first it must be determined whether one limitations period should apply to all actions under the federal Act or whether the limitations period should vary depending on the facts of the case. Wilson, 105 S.Ct. at 1944-47. Then the most appropriate statute of limitations must be determined for the federal cause of action by analyzing which state action is most analogous to the federal claim and whether the state

> statute of limitations governing the state action is consistent with the policies and goals of the federal Act, Id. at 1949.

The Sixth Circuit then addressed the first issue of whether one limitations period should apply to all actions under EAHCA and determined that "the nature of actions that can be brought under [the EAHCA] as well as the [EAHCA's] goal of proper education of the handicapped child make selection of state limitations periods on a case-by-case basis an imperative." Janzen, 790 F.2d at 487. As a result, "[t]he individual case must be characterized by considering the facts, the circumstances, the posture of the case and the legal theories presented." Id.

In Janzen, the Sixth Circuit determined that Tennessee's three-year statute of limitations found in section 28-3-105(3) of the Tennessee Code Annotated

provides the appropriate limitations period for EAHCA appeals concerning reimbursement for privately obtained education for a handicapped child. The court did not determine what statue of limitations governs an appeal of a nonreimbursement matter, but it did acknowledge that the three-year limitations period may not be appropriate in appeals concerning the appropriateness of an education being received from the state.

> Under the [EAHCA], actions may be brought by parents who cannot afford to pay for the schooling first and then seek reimbursement. In these cases, the child is being deprived of proper education while the dispute continues as to who must pay for the education. Parents may under the [EAHCA] dispute the program being provided by the school system. The need for immediate action is much greater in these cases than in the Janzen situation. The shorter statute of limitations probably furthers the goals of the [EAHCA]. If the dispute centers around the proper education to be provided, the federal cause of action may be more analogous to a different state cause of action than

> would be the case in an action seeking reimbursement, as we have here.

Janzen, 790 F.2d at 487. No court has addressed directly the issue of the appropriate imitations period for appeals of nonreimbursement matters.

The Court, having reviewed Tennessee's various statute of limitation provisions in light of the facts, circumstances, posture, and legal theories of the instant case, concludes that the appropriate statute of limitations for plaintiff's appeal to the 1985 decision is Tennesse's sixth (60) day limitations period found in section 4-5-322 of the Tennessee Code Annotated. This provision provides, in pertinent part:

> Proceedings for review are instituted by filing a petition for review in the Chancery Court of Davidson county, unless another court is specified by statute. Such petition shall be filed within sixty (60) days after the entry of the agency's final order thereon.

Id. at Sec 4-5-322 (b)(1).

Plaintiff's appeal of the 1985 due process decision is illustrative of the need for a short limitations period for nonreimbursement actions. Since July of 1985 when the due process decision was rendered, plaintiff's M-Team has met four times and has generated three separate I.E.P.s, and plaintiff has been the subject of another due process hearing. Such a multitude of actions subsequent to the 1985 due process decision makes a decision now as to the issue of the appropriateness of plaintiff's education in 1985 difficult to determine. Furthermore, when the limitations period is so long that another due process hearing has been held, the first due process decision is virtually meaningless.

One of the major goals of the EAHCA is to encourage the speedy resolution of disputes involving a handicapped child's

educational program. In the Senate debates on the EAHCA, SEnator Harrison Williams stated:

> I cannot emphasize enough that delay in resolving matters regarding the education program of a handicapped child is extremely detrimental to his development. The interruption or lack of the required special education and related services can result in a substantial setback to the child's development. Thus, in view of the urgent need for prompt resolution of questions involving the education of handicapped children it is expected that all hearings and reviews conducted pursuant to these provisions will be commenced and disposed of as quickly as practicable consistent with the fair consideration of the issues involved.

121 Cong. Rec. 37416 (1975) (comments of Senator Williams). To this end, the regulations that interpret the EAHCA provide that "the public agency shall insure that not later than 45 days after the receipt of a request for a hearing: (1) A final decision is reached in the hearing; and (2) A copy of the decision is mailed to

each of the parties." 34 C.F.R. Sec. 300.512 (1986). Also, if a state has adopted a two-tier level of review, whereby the hearing officer's decision is appealed not directly to the Court in the first instance, but to the state educational agency, the state educational agency must "insure that not later than 30 days after the receipt of a request for review: (1) A final decision is reached in the review; and (2) A copy of the decision is mailed to each of the parties." Id. The sixty-day Tennessee statute of limitations is consistent with and encourages the EAHCA's goal of speedy resolution of educational disputes concerning handicapped children.

Inasmuch as the 1985 due proces decision was rendered on July 19, 1985, and this action was instituted on May 2, 1986, the Court must conclude that plaintiff's appeal of the 1985 decision was not timely

filed. Accordingly, the appeal of the 1985 decision must be, and hereby is, DISMISSED.

C. 1987 DUE PROCESS HEARING

The Court now turns its attention to the matters addressed by the hearing officer at the 1987 due process hearing. In reviewing the 1987 due process decision, the Court must consider two issues: (1) whether plaintiff had a right to due process hearing to determine his educational placement for the 1986-87 school year; and (2) whether the Sumner County school system was and is capable of providing an appropriate education to plaintiff.

1. Plaintiff's Right to a Due Process Hearing to Determine His Educational Placement.

The EAHCA and regulations promulgated pursuant thereto outline a procedural framework that is designed to ensure

meaningful participation by all concerned parties in decisions concerning a handicapped child's educational placement. Congress' stated purpose in enacting the EAHCA was:

> to assure that all handicapped children have available to them...a free appropriate public education which emphasizes special education and related services designed to meet their unique needs [and] to assure that the rights of handicapped children and their parents or guardians are protected.

20 U.S.C. Sec. 1400(c). The EAHCA defines a "free appropriate public education" to mean:

> special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate pre-school, elementary, or secondary school education in the State involved, and (D) are provided in conformity with [an] individualized education program.

Id. at Sec. 1408 (18). To accomplish this objective, the EAHCA provides federal funds

to state and local educational agencies that undertake to implement the EAHCA. See Rowley, 458 U.S. at 179-84.

The EAHCA uses the I.E.P. as the basic means of insuring that each handicapped child receives an appropriate education. An I.E.P. is defined as a written document that contains:

> (A) a statement of the present levels of educational performance of such a child, (B) a statement of annual goals, including short-term instructional objectives, (C) a statement of the specific educational services to be provided to such child, and the extent to which said child will be able to participate in regular educational programs, (D) the projected date for initiation and anticipated duration for such services, and (E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.

20 U.S.C. Sec. 1401(19). The I.E.P. is developed by a child's M-Team, which consists of the child's parent or parents,

the child's teacher, and a representative of the local educational agency who specializes in special education. 34 C.F.R. Sec. 300.34(a). The EAHCA contemplates that each of the M-Team members, based on his or her educational expertise and knowledge of the child, will provide input at the meting and assist in developing an I.E.P. that addresses the child's individual educational needs.

A handicapped child's I.E.P. ordinarily is formulated in conjunction with a decision as to an appropriate placement for the child. Title 34 C.F.R. Sec. 300.552(a)(2) provides that "[e]ach public agency shall insure that: (a) Each handicapped child's educational placement...[i]based on his or her individualized education program." The appendix to the regulations promulgated to implement the EAHCA outlines the normal

sequence of events:

> 42. When must IEP objectives be written before placement or after placement?
>
> IEP objectives must be written before placement. Once a handicapped child is placed in a special education program, the teacher might develop lesson plans or more detailed objectives based on the IEP; however, such plans and objectives are not required to be part of the IEP itself.

34 C.F.R. Part 300, Appendix C, Question 42 at 84 (emphasis in original). A later provision, however, indicates that the process of formulating an I.E.P. and making a placement decision may go hand-in-hand:

> 59. If placement decisions are made at the time the IEP is developed, how can a private school representative attend the meeting?
>
> Generally, a child who requires placement in either a public or private residential school has already been receiving special education, and the parents and school personnel have often jointly ben involved over a prolonged period of time in attempting to find the most appropriate placement for the child. At some point in this process (e.g., at a meeting where the child's current IEP is being

> reviewed), the possibility of residential school placement might be proposed - by either parents or school personnel. If both agree, then the matter would be explored with the residential school. a subsequent meeting would then be conducted to finalize the IEP. At this meeting, the public agency must ensure that a representative of the residential school either (1) attends the meeting, or (2) participates through individual or conference telephone calls, or by other means.

Thus, in formulating an I.E.P. for a handicapped child, the child's M-Team first must identify educational objectives, including an articulation of general educational needs and services that will be required to ensure that the child receives an appropriate education. Only then can placement options be considered.

> Not until the long and short term goals of the child and the specific educational services to be provided are determined can an appropriate placement decision be made. Only then does a decisionmaker have a basis for deciding whether the educational needs of the child can be served in a daily, as opposed to residential, program.

Spielberg v. Henrico County Public Schools, 1986-87 E.H.L.R. 558:202,203-04 (E.D. Va. 1987). After educational objectives are defined, consideration of the proper placement for a handicapped child, if drawn into question by a parent, should take place at this juncture because the educational environment in which the handicapped child will be studying must be determined before more specific educational goals for a specified time period can be formulated. For example, the services available to a handicapped child in a day program at a public school may be very different from those available at a private residential facility. As a result, if an M-Team formulates specific educational objectives for a handicapped child based on the assumption that he will be attending the day school, and a determination is later made that the child should attend a

private residential facility, specific educational objectives would need to be totally reformulated. In sum, in determining whether the procedural requirements of the EAHCA and the regulations promulgated pursuant thereto have been met, the Court must recognize that the final I.E.P. is not a document that in every must be completed before a placement decision is made.

If the members of a handicapped child's M-Team cannot reach agreement on any aspect of the child's educational program, including placement, a due process hearing before an impartial hearing officer may be requested pursuant to 20 U.S.C. Sec. 1415 (b)(2) and 34 C.F.R. Sec. 300.506. The latter regulation provides: "A parent or a public educational agency may initiate a hearing on any of the matters described in Section 300.504(a)(1) and (2)." Section

30.504 provides:

> (a) Notice. Written notice which meets the requirements under Section 300.505 must be given to the parents of a handicapped child a reasonable time before the public agency:
>
> (1) Proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child, or
>
> (2) Refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education of the child.

In the instant case, the hearing officer at the 1987 hearing concluded that plaintiff's parents were not entitled to reimbursement for plaintiff's educational expenses at the Brehm School during the 1986-87 year. In support of this finding, the hearing officer determined that plaintiff's parents were precluded from seeking reimbursement because they had bypassed two important safeguards, the M-Team meeting and the due process hearing,

prior to enrolling plaintiff at the Brehm School. In the Court's view, this determination plainly is erroneous.

In Burlington School Committee v. Department of Education, 471 U.s. 359 (1985), the Supreme Court determined that the parents of a handicapped child who placed their child in a private special educational school, despite disagreement by school officials with the parent's determination that the private placement was necessary, were permitted to seek reimbursement for the child's educational expenses. More specifically, the Court considered whether the child's parents had waived any right to reimbursement because they had violated 20 U.S.C. Sec. 1415 (e)(3), which provides: "During the pendency of any proceedings conducted pursuant to [Sec. 1415], unless the State or local educational agency and the parents

or guardian otherwise agree, the child shall remain in the current educational placement of such child." In holding that no waiver had occurred, the Court stated:

> We do not agree with the Town that a parental violation of Sec. 1415(e)(3) constitutes a waiver of reimbursement. The provision says nothing about financial responsibility, waiver, or parental right to reimbursement at the conclusion of judicial proceedings. Moreover, if the provision is interpreted to cut off parental rights to reimbursement, the principal purpose of the Act will in many cases be defeated in the same way as if reimbursement were never available. As in this case, parents will often notice a child's leaning difficulties while the child is in a regular public school program. If the school officials disagree with the need for special education or the adequacy of the public school's program to meet the child's needs, it is unlikely they will agree to an interim private school placement while the review process runs its course. Thus, under the Town's reading of Sec. 1415(e)(3), the parents are forced to leave the child in what may turn out to be an inappropriate educational placement or to obtain the appropriate placement only by sacrificing any claim for reimbursement. The Act was intended to give handicapped children both an

appropriate education and a free one; it should not be interpreted to defeat one or the other of those objectives.

The legislative history supports this interpretation favoring a proper interim placement pending the resolution of disagreements over the IEP:

"The conferees are cognizant that an impartial due process hearing may be required to assure that the rights of the child have been completely protected. We did feel, however, that the placement, or change of placement should not be unnecessarily delayed while long and tedious administrative appeals were being exhausted. thus the conference adopted a flexible approach to try to meet the needs of both child and the State."

....

This is not to say that Sec. 1415(e)(3) has no effect on parents. While we doubt that this provision would authorize a court to order parents to leave their child in a particular placement, we think it operates in such a way that parents who unilaterally change their child's placement during the pendency of review proceedings, without the consent of state or local school officials, do so at their own financial risk. If the courts ultimately determine that the IEP proposed by the school officials was appropriate, the parents would be

> barred from obtaining reimbursement for any interim period in which their child's placement violated Sec. 1415(e)(3).

Although the facts of the Burlington School Committee case are not directly apposite, the Court finds that the statement of law contained in that case is applicable to this case. Thus, plaintiff's parents are not precluded from seeking reimbursement solely because the state did not agree in advance to the placement of plaintiff at the Brehm School. In arriving at the conclusion that the hearing officer should have considered whether plaintiff's placement at the Brehm School was appropriate, the Court does not suggest that the procedural safeguards enunciated in the EAHCA and regulations promulgated pursuant thereto may be disregarded.

A due process hearing officer properly may refuse to determine a matter pertaining

to the education of a handicapped child if the parents have refused to participate in the proces of formulating an I.E.P. for their child. The instant case, however, does not present such a situation. Plaintiff's M-Team met a number of times prior to the April 25, 1986, meeting at which plaintiff's mother specifically requested that an I.E.P. be formulated placing plaintiff at the Brehm School. As a result, the M-Team members were well aware of plaintiff's educational needs, and general educational objectives had been formulated numerous times in preparing earlier I.E.P.s. Having developed a full awareness of these objectives, the next step for the M-Team should have been to formulate for plaintiff specific education goals for a specified time and in a particular educational setting. Thus, the consideration of placement alternatives at

that juncture was appropriate. Indeed, the record reveals that a teacher from the Hendersonville High School that plaintiff was scheduled to attend was present and attempted to explain what programs the high school could offer to assist plaintiff. Plaintiff's mother, who already had determined that her son should attend the Brehm School, responded by openly acknowledging that her only interest was in formulating an I.E.P. placing plaintiff at the Brehm School. this request was expressly refused by other members of the M-Team, and the meeting then was ended by plaintiff's lawyer.

Under the circumstances, further discussion of a placement for plaintiff at the Hendersonville High School was unnecessary. Plaintiff's mother had expressly rejected it as an option. Although no final I.E.P. was formulated

that articulated the specific educational objectives for plaintiff for the 1986-87 school year, the determination of placement was of central importance and required action before such objectives could be enunciated. Toward this end, plaintiff's mother requested a due process hearing to consider whether plaintiff was properly placed at the Brehm School and whether Sumner County should be required to reimburse her for plaintiff's expenses while attending the Brehm School during the 1986-87 school year and in the future. After hearing two day so proof, the hearing oficer issued a decision denying the parent's request for reimbursement for the 1986-87 school year.

Based on the foregoing findings, the Court concludes that plaintiff's parents fulfilled their obligation to participate on plaintiff's M-Team in formulating an

I.E.P. and, when a disagreement arose as to plaintiff's placement, they properly requested a due process hearing at which time they requested that Sumner County reimburse them for plaintiff's expenses while enrolled at the Brehm School. the hearing officer, however, erroneously concluded that plaintiff's parents had not complied with the procedural requirements enunciated in the EAHCA and therefore, that they were precluded from obtaining any reimbursement.

2. Sumner County's Ability to Provide an Appropriate Education for Plaintiff

As noted above, the EAHCA requires states to promulgate policies that assure "all handicapped children the right to a free appropriate public education" with a goal "of providing full educational opportunity to all handicapped children." 20 U.S.C. Sec. 1412(1) and (2)(A)(i). In

determining what constitutes an appropriate education, "[t]he educational opportunities provided by our public schools undoubtedly differ from student to student depending upon a myriad of factors that might affect a particular student's ability to assimilate information presented in the classroom." Rowley, 458 U.S. at 198. No specific criteria for complying with the EAHCA have been articulated by Congress, but the Supreme Court has articulated an "educational benefits" test as follows:

> Implicit in the congressional purpose of providing access to a "free appropriate public education" is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child,.... We therefore conclude that the "basic floor of opportunity" provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.
>
> When the language of the Act and its legislative history are

> considered together, the requirements imposed by Congress become tolerably clear. Insofar as a State is required to provide a handicapped child with a "free appropriate public education," we hold that it satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. Such instruction and services must be provided at public expense, must meet the State's educational standards, must approximate the grade levels used in the State's regular education, and must comport with the child's IEP. In addition, the IEP, and therefore the personalized instruction, should be formulated in accordance with the requirements of the Act and, if the child is being educated in the regular classrooms of the public education system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.

Id. at 200-01, 203-04.

In the instant case, defendants contend that plaintiff was receiving an appropriate education at the time he was withdrawn from the Sumner County school

system and that the school system has been capable of providing an appropriate education to him since that time. The proof, however, does not support defendants position. First, in the three years prior to attending the Brehm School, plaintiff took three achievement tests in which his performance, as compared to his peers, consistently dropped. In 1983, his average percentile score was 25.4%, yet just over two years later, his average percentile score dropped to 11.8%. Second, despite defendants' assertion that plaintiff was incapable of grade level work, the proof revealed that plaintiff has performed at grade level since attending the Brehm School. Thus, this case does not present the situation in which a handicapped child is making modest progress in a state public school, but is capable of making better progress in a private residential program.

Rather, plaintiff was moving backward in his educational development at an alarming rate while attending Sumner County schools, but after being placed in the Brehm School, he has shown marked improvement. As a result, the Court must conclude, based on the evidence before it, that plaintiff was not receiving from Sumner County as appropriate education under the educational benefits test prior to his enrollment at the Brehm School.

The Court further concludes that the Brehm School is a proper placement for plaintiff because it is the least restrictive environment, based on the facts before the Court, in which he can receive an appropriate education. In making this determination, the Court does not conclude that all students experiencing language disorders like those being experienced by plaintiff require a residential placement.

Such decisions must be made on a case-by-case basis and depend, in part, on what educational opportunities short of such a placement the state offers to a particular handicapped child. In the instant case, plaintiff's disorders are serious, but with proper educational services he has been found to be capable of grade level work. Inasmuch as the Sumner County schools were not offering appropriate educational services sufficient to enable plaintiff to achieve any degree of educational advancement, but instead were causing his educational development to decline, the Court must conclude that the economic benefits test would not be satisfied if plaintiff was enrolled in the Sumner County school system today. As a result, the Court finds that plaintiff has been and is properly placed at the Brehm School.

In sum, the Court REVERSES the findings of

the hearing officer that plaintiff had no right to a due proces hearing to determine his educational placement and further FINDS, based on a preponderance of the evidence that plaintiff's placement at the Brehm School is appropriate.

D. Relief

Having determined that plaintiff's placement at the Brehm School was proper, the Court now must consider what relief should be accorded to plaintiff's parents for plaintiff's expenses at the Brehm School. The Court concludes that plaintiff's parents are entitled to reimbursement for the cost of plaintiff's placement at the Brehm School during the 1986-87 school year and during the Fall semester of the 1987-88 school year as set forth in the stipulations submitted by the parties and to reimbursement of future costs for the remainder of the current

school year and thereafter so long as the Brehm School remains the appropriate placement for plaintiff.

III. SUMMARY

Plaintiff in this lawsuit is a handicapped child who appeals two decisions by state-appointed hearing officers pertaining to his education pursuant to the Education For All Handicapped Children Act, 20 U.S.C. Sec. 1401, et seq. In this memorandum, the Court DISMISSES plaintiff's appeal of the due process hearing decision rendered in 1985, which concerned whether plaintiff was receiving an appropriate education, as untimely filed. With respect to plaintiff's appeal of the due process hearing in 1987, which pertained to whether plaintiff was properly placed at a private residential educational facility, the Brehm School, the Court REVERSES the due process hearing decision and FINDS that plaintiff's

placement was appropriate. As a result, the Court ORDERS the state to reimburse plaintiff's parents for the costs incurred by plaintiff in attending the Brehm School.

An Order will be entered simultaneously with this Memorandum.

No. 88-5398

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

AUGUST 10, 1989

ORDER

John DOE, a minor, by and through his parent and next friend, Mary Doe

Plaintiffs - Appellee

v.

Charles SMITH, Commissioner, Tennessee Department of Education, et. al.

Defendants

SUMNER COUNTY BOARD OF EDUCATION

Defendant - Appellant

BEFORE: NELSON AND NORRIS, CIRCUIT JUDGES; FRIEDMAN, DISTRICT JUDGE*

Upon consideration of the petition for rehearing filed by the appellee, the court concludes that the issues raised therein were fully considered upon the original

oral argument and decision of the case.

It is therefore ordered that the petition for rehearing be and it hereby is denied.

Entered by order of the Court

Leonard Green, Clerk

*The Honorable Bernard A. Friedman, District Judge for the Eastern District of Michigan, sitting by designation.

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

No. 88-5398

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JOHN DOE, a minor, by and through his parent and next friend, MARY DOE,
Plaintiff-Appellee,

v.

CHARLES SMITH, Commissioner, Tennessee Department of Education et al.,
Defendants,

SUMNER COUNTY BOARD OF EDUCATION,
Defendant-Appellant.

ON APPEAL from the United States District Court for the Middle District of Tennessee.

Decided and Filed July 13, 1989

Before: NELSON and NORRIS, Circuit Judges; and FRIEDMAN, District Judge.*

ALAN E. NORRIS, Circuit Judge. Charles Smith, Com-

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*The Honorable Bernard A. Friedman, United States District Judge for the Eastern District of Michigan, sitting by designation.

missioner of the Tennessee Department of Education, and the Sumner County Board of Education appeal from a decision of the district court under the Education For All Handicapped Children Act of 1975 ("the EAHCA"), 20 U.S.C. § 1401 *et seq.* (1978). The district court concluded that the school system had failed to provide John Doe with a free and appropriate public education as required by the EAHCA and ordered the school system to pay for his tuition at a private, residential facility. For the reasons discussed below, we reverse the district court and remand in order that the administrative procedures prescribed by the EAHCA may be fully exhausted.

I.

The EAHCA makes federal funds available to the states in order to assist them in educating handicapped children, on the condition that the states comply with the goals and procedures provided for by the Act. *Board of Educ. v. Rowley,* 458 U.S. 176, 179 (1982). It was passed in response to the perception of members of Congress that handicapped children were excluded from schools or were not participating in their classrooms. *Id.* The main requirement of the EAHCA is that each participating state provide a "free and appropriate education" to all handicapped children within its jurisdiction. 20 U.S.C. § 1412(2). "[T]he 'basic floor of opportunity' provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." *Rowley,* 458 U.S. at 201 (footnote omitted). While, in order to be "appropriate," the educational benefits provided by the states must be more than *de minimis, Polk v. Central Susquehanna Intermediate Unit 16,* 853 F.2d 171, 182 (3d Cir. 1988), *cert. denied,* 109 S.Ct. 838 (1989), they need not maximize the potential of each handicapped child commensurate with the opportunity provided nonhandicapped children. *Rowley,* 458 U.S. at 204 n.26. The standard is satisfied "by

providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Id.* at 203.

The public education required by the EAHCA is to be tailored to the unique needs of each handicapped child and set forth in an Individualized Educational Program ("IEP"). 20 U.S.C. § 1401(18). An IEP is prepared by a representative of the local educational agency, the child's teacher, the child's parents, and, whenever appropriate, the child (together, the "M-Team"). 20 U.S.C. § 1401(19). It must be reduced to writing and contain a statement of the present levels of educational performance, annual goals, the specific educational services to be provided, and objective criteria and evaluation procedures. *Id.* At least annually, a local educational agency must review the IEP and revise it when appropriate. 20 U.S.C. § 1414(a)(5).

The EAHCA also imposes various procedural requirements. For example, parents must be notified of any proposed change in their child's IEP. 20 U.S.C. § 1415(b)(1)(C). A parent who is dissatisfied with any aspect of his or her child's education is entitled to a due process hearing. 20 U.S.C. § 1415(b)(2). That hearing may be conducted by the state educational agency, or by the local educational agency or intermediate educational unit, although an employee of an agency or unit involved in the education or care of the child may not conduct the hearing. *Id.* Furthermore, if the hearing is before a local educational agency or intermediate educational unit, a direct appeal must be provided to the state educational agency. 20 U.S.C. § 1415(c). An aggrieved party may appeal from the decision of a due process hearing to either a state court or to federal district court. 20 U.S.C. § 1415(e)(2). The party challenging the administrative determination assumes the burden of persuading the court that the determination was incorrect. *Kerkam v. McKenzie,* 862 F.2d 884, 887 (D.C. Cir. 1988).

II.

John Doe is a handicapped child as defined by § 1401(a)(1) of the EAHCA. He suffers from agenesis of the corpus callosum, which is a language disorder that impairs communication between the two hemispheres of his brain. At the time this action was initiated, Doe was sixteen years old and about to enter the tenth grade in the Sumner, Tennessee school system. With the exception of one year—when he attended a private school—he had been in the Sumner school system since he was in the second grade.

Doe's parents participated in the formation of his IEP for the 1984-85 school year; however, in the spring of 1985, they became dissatisfied with its implementation. His mother, Mary Doe, requested a due process hearing to resolve the dispute that had arisen between the Does and the school system. The state appointed an employee of another school system to conduct the due process hearing. The hearing was held on June 18, 1985, and the hearing officer determined that the school system had provided Doe with an appropriate education as required by the EAHCA. There was no appeal from that determination.

Doe attended the school system in 1985-86 and, on April 25, 1986, the M-Team, including Mary Doe, set out to develop a new IEP for the 1986-87 school year, the year he would be entering high school. According to the district court, the following occurred at that meeting:

> Plaintiff's mother attended the meeting with her lawyer. The resource teacher attempted to explain what programs the high school could offer to assist plaintiff. Plaintiff's mother, however, prevented the teacher from describing the high school's program, telling the M-Team members that she was not there "to investigate the possibility of high school . . . . It was [not] appropriate." Instead, she requested that the M-Team develop an IEP placing

> plaintiff in the Brehm School, which is located in Carbondale, Illinois. . . . The M-Team refused plaintiff's mother's request and stated that it was not proper to go from an educational program that was almost the least restrictive to one that was the most restrictive. The lawyer accompanying plaintiff's mother then abruptly terminated the meeting stating that they intended to "test the limits of the law."

Without M-Team approval, Doe was removed from the Sumner school system and enrolled at the private school at a first-year cost of $18,425.05. On May 22, 1986, Doe filed an action in federal district court, alleging that the Sumner school system had failed to provide him with an appropriate education as required by the EAHCA. While that action was pending, the Does requested another due process hearing, which was held before a hearing officer in March of 1987. The hearing officer determined that, because the Does had by-passed the procedùral requirements of the EAHCA, they were precluded from seeking reimbursement for Doe's first-year costs at the private school. Furthermore, with regard to future expenses at the private school, he determined that the issue was not ripe for review because the Sumner school system had not been given an opportunity to propose an IEP. The hearing officer suggested that the M-Team meet in order to consider an IEP for John.

That meeting occurred on May 28, 1987. The school system proposed an IEP for the 1987-88 school year with which Mary Doe did not agree. Rather than requesting a due process hearing on the adequacy of the plan, she filed a supplemental complaint in district court requesting that it find that the private school was an appropriate placement for John under the EAHCA, and seeking an award for reimbursement of costs incurred at the school.

After deciding that Doe had not waived his right to seek reimbursement because he was unilaterally placed in the pri-

vate school, the district court concluded that test scores indicated that Doe had not progressed while attending the Sumner school system, and the system therefore had failed to provide an appropriate education. It reasoned that, based upon his performance at the private school, it was the least restrictive environment in which Doe could receive an appropriate education. Accordingly, it ordered the Sumner school system to pay for Doe's tuition at the private school. It is from that decision that the state has appealed.

III.

A district court is faced with a two-fold inquiry on an appeal under 20 U.S.C. § 1415(e)(2). First, it must determine whether the state has complied with EAHCA procedures. Second, it must determine whether the proposed IEP is in substantive compliance with the EAHCA in that it is reasonably calculated to enable a child to receive an educational benefit. *Rowley*, 458 U.S. at 206-07. District courts should avoid imposing their view of preferable educational methods upon the states, and proceed with the understanding that state and local educational agencies are charged by the Act with the primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable for the child's needs, since they possess the requisite specialized knowledge and experience on educational policy. *Id.* at 207-08. The Act contemplates that the special knowledge and experience of the agencies will be utilized in devising the plan, that it will be fine-tuned through the cooperation of the child's teachers and parents, and that the advice of a qualified and impartial hearing officer will be available concerning the adequacy of the plan.

This court has determined that *Rowley* "requires a *de novo* review [of the due process hearing] but that the district court should give due weight to the state administrative proceedings in reaching its decision." *Roncker ex rel. Roncker v. Walter*, 700 F.2d 1058, 1062 (6th Cir.), *cert. denied*, 464 U.S.

864 (1983). That principle makes sense because federal courts are "generalists with no expertise in the educational needs of handicapped children," and will benefit from the fact-finding of a state agency with expertise in the field. *Crocker v. Tennessee Secondary School Athletic Assoc.*, 873 F.2d 933, 935 (6th Cir. 1989).

We agree with the district court that by unilaterally placing Doe in the private school, the Does did not waive a right to seek redress under the EAHCA. *School Comm. v. Department of Educ.*, 471 U.S. 359, 372 (1985). Accordingly, the hearing officer incorrectly determined that he could not decide whether the proposed IEP for the 1986-87 school year was in substantive compliance with the EAHCA. After reaching that conclusion, however, the district judge should have remanded the case in order for the hearing officer to reach the substantive issue.

While *School Comm.* stands for the proposition that the parents' unilateral act of removing their child from a public school does not waive the right to seek reimbursement under the EAHCA, it does not mean that the procedures in the EAHCA may be by-passed. Absent a showing that exhaustion of the administrative process would be futile or inadequate, *Honig v. Doe*, 484 U.S. 305 (1988), "parents and guardians [must] *use* the state process which the act specifies shall be provided to them." *Crocker*, 873 F.2d at 935 (collecting cases).

> [T]he Congressional emphasis upon full participation of concerned parties throughout the development of the IEP, as well as the requirements that state and local plans be submitted to the Secretary for approval, demonstrates the legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP.

> Thus the provision that a reviewing court base its decision on the "preponderance of the evidence" is by no means an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review. The very importance which Congress has attached to compliance with certain procedures in the preparation of an IEP would be frustrated if a court were permitted simply to set state decisions at nought. The fact that § 1415(e) requires that the reviewing court "receive the records of the [state] administrative proceedings" carries with it the implied requirement that due weight shall be given to these proceedings.

Rowley, 458 U.S. at 206.

This court recently reiterated that the exhaustion requirement furthers the substantive purposes of the EAHCA by allowing the state to apply its expertise in an area where the needs of a handicapped child are better served by having the parents and local educational agencies work together. *Crocker*, 873 F.2d at 935. In order for a reviewing court to accord "due weight" to state administrative proceedings, the court must accommodate the procedures contempated by the Act so that there is an administrative decision to review. There was no such decision regarding the proposed IEP for the 1985-86 school year.

Likewise, the substantive propriety of the proposed IEP for the 1987-88 school year should have been addressed at a due process hearing. Toward that end, the Does were procedurally required to request a due process hearing, instead of going directly to the district court. *See, e.g., Evans v. District No. 17*, 841 F.2d 824, 831 (8th Cir. 1988). We do not, therefore, decide whether the district court correctly determined that the Sumner school system had failed to provide Doe with an appropriate education. The district judge should have

returned the case to the hearing officer once he determined that the officer incorrectly decided the procedural issue relating to the proposed 1986-87 IEP, and that there was no administrative decision with regard to the proposed 1987-88 IEP. The standards discussed in this opinion concerning the adequacy of a state's efforts to comply with the EAHCA will apply, should the district court be called upon to review future decisions of a state hearing officer.

IV.

For the foregoing reasons, the order of the district court is **reversed,** and this cause is **remanded** for further proceedings according to law and consistent with this opinion.